



July 23, 2004

**Re: Annual Assessment of the Status of Competition
in the Market for the Delivery of Video
Programming, MB Docket No. 04-227**

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Ms. Dortch:

The America Channel is an independent, family-friendly cable network which is set to celebrate America, its communities, unsung heroes, and ordinary people who accomplish extraordinary things. The America Channel was formed in January 2002, and has been trying since May 2003 to secure distribution from the major cable operators. For a number of reasons discussed herein, The America Channel is an exceptional product.

To date, The America Channel has not been able to secure carriage on the critical mass of cable operators, notwithstanding an exceptional product. The America Channel believes that part of the reason for this inability is related to structural problems and dysfunctions in today's MVPD market. It is almost impossible today for a truly independent programmer to secure carriage, no matter how high-quality the content, and the facts bear this out starkly. Something needs to be done. Ensuring a fair opportunity for carriage for independent programmers, is squarely within the Commission's statutory responsibilities.

At the same time, the Commission's tool of first resort in this instance need not be over-regulatory. Increased engagement with the questions of carriage, stepped up oversight, and requests for additional information, can help achieve real progress, obviating more regulatory measures, either by the Commission or by Congress, unless the situation remains unchanged.

Thus, as a first step, the Commission must request periodic reports by cable operators on the following issues. Among other things: (1) Cable operators must inform the Commission what are the criteria used to determine whether to provide carriage to an independent programming network, an MSO-owned network, and a conglomerate-owned network; and (2) Cable operators must inform the Commission on a semi-annual basis with respect to new inquiries from independent networks, and the status or dispensation thereof.

This information will allow the Commission to determine how many truly independent networks have received carriage in the past year, and to develop a "scoreboard" of the ease or difficulty with which independent programmers gain access on MSO platforms. Such a scoreboard will in turn become a crucial tool for assessing the extent of the program carriage problems for

independent programmers and recognizing the individual MSOs who make progress in that regard.

The Commission should also:

- (a) support the establishment of a *free tier of widely distributed networks*,
- (b) enforce its rules to combat the *bundling* practices of the large media conglomerates,
- (c) support the deployment of methods and technology that will allow *consumers* to select which new networks secure carriage, and
- (d) *enforce* vigilantly its program carriage rules.

Large cable operators have a unique opportunity to proactively demonstrate real leadership, promote competition, serve the public interest and make available quality family-friendly content that consumers want. The extent to which cable operators are willing to diversify their base of content to include high-quality, family-friendly independent networks, should be viewed as one indicator in a larger litmus test reflective of the cable operators' true commitment to competition, public interest and quality of content.

I. The America Channel – Overview and History

The America Channel (TAC) is an independently owned 24/7 non-fiction cable television programming network that tells the extraordinary stories of real America. It is an exploration of what the country is today – a single nation of diverse people and cultures, powerful personal stories, wide-ranging opinions, and lofty dreams and ambitions. TAC is a storytelling network that shows how everyday Americans live, work, play, achieve, and transform this country. Its programming showcases American communities, campuses, local heroes, and ordinary people who accomplish extraordinary things from every corner of America. With its core focus on community, connectivity and basic human interest in real stories and real people, The America Channel tells the ever-changing story of America through the eyes of real Americans. It is a real reflection of our times and the embodiment of the American Spirit. Market research has shown that TAC's brand of "real people, real stories" content is vastly underserved; and that there is broad-based and strong consumer demand for it.

To date, EchoStar, a pro-competition distributor with a history of embracing high-quality independent products, has expressed interest in carrying The America Channel and making it available to Americans nationwide via its DBS system, should TAC secure among other things requisite funding, additional cable carriage, and successfully launch. The America Channel also has an agreement with Buckeye Systems in Toledo for distribution to 150,000 *analog* subscribers. The America Channel also has a fully negotiated (though unsigned) draft agreement with one MSO. Of course, the viability of The America Channel depends on carriage on the large MSOs. To date, The America Channel has been unable to secure such carriage.

The concept of The America Channel commenced in January 2002. It was several months after 9/11, and the breaking news from that tragic day has faded. Television networks had reverted back to extreme reality shows with their nonsensical plots, sex and violence. But America had permanently changed. In fact, our market research mirrored research of leading research organizations as well as Fortune-50 consumer product companies with whom we are in sponsorship and advertising discussions. This research indicates a quantum, long-term shift in Americans' core value structure – away from tangibles like salary, stock market and products –

and toward intangibles -- like my community, my family, my home, my free time, happiness, positivism, constructiveness, and authenticity.

At that time, The America Channel commenced its planning and development. Over the course of the next 18 months until July 2003, development was conducted in stealth. TAC retained the services of a leading planning and development firm (Vanguard Media, which developed Golf Channel, SciFi, TechTV and others); created its initial slate of programming and a new business model that allowed the channel to thrive in the digital age; conducted qualitative market research; conducted quantitative research with the assistance of SmithGeiger, a leading firm which represents CNN and others; and spent roughly \$1 million to perfect its product before ever approaching a single operator – no small feat for a small, independent network.

In the course of the qualitative market research, which was conducted on both coasts with several live focus groups, Americans said that they knew where to find stories about Britney Spears and J Lo. They also knew where to find nonsensical extreme reality shows.

But in a post 9/11 world, they were looking for more resonant programming, more programming that deals with what makes America special, more community, more connectivity and more authenticity on television - all in a family-friendly format. The America Channel responded to their needs.

The America Channel's focus is on real people and communities. Its original programming sets it apart from any network either existing or planned. It (a) resonates with multiple segments of the population, (b) has a unique ability to engage viewers on a personal level, and partner with the local system, (c) easily builds high-impact cross-promotions with its national advertisers, and (d) has an ability to generate unique "grass roots" support.

Clearly this kind of network has not existed before, and our market research, as well as our diligence in the field, confirm that an overwhelming majority of Americans consider The America Channel to be unique and compelling.

II. Market Demand

The America Channel's aggregate research results are as high as any network ever tested by our distinguished market research firm and media advisory firm. We clearly know we have a blockbuster product, and an answer to the problems of television. Some of the results of the research included:

A. General:

- **63%** of all respondents are "likely to watch" The America Channel.
- **More than 50%** of every age demographic said that they would be "likely to watch" The America Channel.
- **7** show concepts achieved a **40%** interest level or greater, and **10** show concepts achieved a 30% interest level or greater, with significant increases in certain key demographics, such as Female 25 to 49 and Male 18 to 24.
- **6** show concepts achieved a **50%** interest level or greater in at least one of these demographics.

B. Comparative:

- Respondents felt that The America Channel's content will be equal to or exceed that of top non-fiction networks such as *Discovery Channel*, *The History Channel*, *TLC*, *CNN*, *Fox News*, *Travel Channel* and others.

C. Attitudinal:

- **64%** want more content that they can watch with their families.
- **63%** want more content that deals with what makes America special.
- **58%** say current television does not reflect what they see as the "real America".
- **58%** want more content that connects them with other Americans.

D. Behavioral:

- **23%** of analog subscribers state they would probably or definitely consider upgrading if TAC was only available on digital cable service.
- **15%** of current digital subs state that they would be more likely to keep their digital service if TAC became available on digital cable.
- **12%** of cable subscribers overall, and **12%** of basic cable subscribers would consider switching to satellite if TAC was only available on a satellite subscription in their area.
- **18%** of multichannel subscribers would view TAC as a major enhancement to their current service and **66%** view it as providing some enhancement.

III. Field Work at Cable Systems

In the course of the next 7 months, The America Channel's CEO personally visited dozens of cable systems in cities around the country – from Toledo to Milwaukee, Atlanta to Denver, Kansas City to San Antonio, Dayton to Denver, Baltimore to Independence, and many other cities. The America Channel was resonating deeply in Middle America. The overwhelming majority of systems visited reacted very favorably to The America Channel, indeed considering The America Channel to be among the best new products on the market, and in some cases even worthy of analog carriage.

At the system level we met some very talented, hard working and dedicated people. At the system level, cable representatives live in the community, care about the community, are connected to the community, and understand well what resonates with their consumers. These are not ivory-tower folk.

Following are some of the reactions we received at the system level:

"I see hundreds of networks. This one is the real deal. People will get passionate about this network. Some networks are 'must-haves' because people are so passionate about them, for example Fox News or certain Sports Nets. But they still don't scale to the entire population. This network will generate the passion, but will also scale to the entire population. I think this is fantastic, I really like it... I agree with everything you're saying... I think you will be successful."
 – *Regional Division of major MSO.*

“This is a great product. I really like it. I don’t normally make calls for networks [to Corporate]; but I will for this one. You won’t have a hard time convincing us to be a charter system.” – *Top-30 DMA*.

“This is exactly the kind of programming I like to watch. It just really sits well with me. This is really good.” – *Top-30 DMA*.

“You have a solid business model. I really like it.” – *Top-75 DMA*.

"The appeal of this network is strong enough and broad enough that we will give serious consideration to carrying it on analog. I also see this network generating additional revenue for us on analog, for example the local avails and pre-emption blocks that you’re offering. This is really impressive... fantastic... unique... It is exactly aligned philosophically with what we are trying to do in our community."—*Top-100 DMA*..

“This is phenomenal. When are you launching?” – *Top-20 DMA*.

“I like it. It should get good play in our city. I see a different network each day -- This one has legs.” – *Top-5 DMA*.

“I think it’s a great concept. I love it. I would definitely watch it.” – *Top-100 DMA*.

“This is great... It is really neat. As an industry, Cable does not do enough of this kind of real-life content. The America Channel gives us a real opportunity to connect [with our subscribers].” – *Top-50 DMA*.

“The only problem, if there is one, is that there are so many great stories from so many places that you’ll have trouble choosing which ones to air -- That’s a good problem to have... This is exactly what my wife and I like to watch... This product is awesome. We’ve only endorsed one other network in our history. This channel comes as close as any network to getting an endorsement.” – *Top-15 DMA*.

“This is like an analog channel. You...will give a lot of content ‘bang’ and a local feel that will further differentiate your product from the other networks. TAC looks better every day.” – *Top-10 DMA*.

“Conceptually, it resonated very strongly with me... [I]n the post 9-11 American psyche, I for one could use an occasional dose of those things I need to remind me just how fortunate I am to have been born in America. And if I (a.k.a. Joe Sixpack) like it, I’m sure many others will too. I think it’s a pretty cool concept...” – *Letter from a Top-60 DMA system to MSO Corporate*. “I’m sold. Tell me what you want me to do for you.” – *Same system, in meeting with TAC*.

“This is really strong and unique. 60% of my constituency is Hispanic – the largest in the State. There is nothing on television, whether in English or Spanish, that does what this network does for my constituency. You have the ability to create greater understanding and harmony among the different people of America.” -- *Top-50 DMA*.

“This is a really good product. I will speak to [Corporate].” – *Top-10 DMA*.

“This is powerful. I agree with everything you said.” – *Top-40 DMA*.

“Our region in particular will like it. No one is taking reality to this level. I meet with two networks a day – this one is particularly good.” – *Regional Division of major MSO.*

“This looks like an analog channel.” – *Top-30 DMA.*

”This is a really good product. It’s exactly what we need.” -- *Regional Division of major MSO.*

“This is great. It’s almost like an analog channel.” – *Top-30 DMA.*

“I think this product is great. We have [x] regions. Each one has a lot of subscribers, so all you need is to get one region to endorse it.” – *Major MSO.*

“”There’s no question it’s a worthwhile product. We’re just in no rush to give you a deal.” – *Major MSO.*

”The programming planned by The America Channel promises to be so powerful and resonant with our customers that there was no question in our mind that it belonged on expanded-basic analog cable so that it could reach the most possible viewers. We believe The America Channel should be a core offering for any cable operator.” – *Alan Block (Buckeye Systems), in prepared statement following TAC analog carriage deal for 150,000 subscribers.*

Based on information and belief, we assume that the CEOs of content conglomerates and their senior executives do not personally visit dozens of systems to gauge and build popular appeal for their new nets, and attempt to understand and satisfy the needs of the consumer, all in the effort to convince an MSO to provide carriage. In fact, we believe that the process of convincing an MSO to provide carriage to a conglomerate-owned net or an MSO-owned network, is different than for an independent network.

IV. MSO Discussions

The America Channel seeks “hunting licenses” from the major MSOs. A hunting license provides no subscriber commitment whatsoever. Rather, it gives the programmer the ability to market directly to cable systems in the field, and try to convince the cable systems that that programmer’s product should be carried, in some cases instead of a bundled net from a conglomerate. This is an extremely pro-competition approach, as it requires the programmer to compete with every other network for capacity. If an MSO refuses to grant a hunting license, it is essentially preventing the programmer from fairly competing with all other networks at the system level. If a programmer is truly unworthy, then that programmer will not be able to convince the cable systems to provide carriage anyway. But to prevent the programmer from even approaching the system, is anti-competitive and not in the best interest of the consumer.

The reasons for the inability to secure carriage are in our view many. They include:

- (a) The market power wielded by large media conglomerates, which have followed a practice of bundling;
- (b) The market power still enjoyed by large cable operators, which in some cases do not seem to have adequate incentive to reach out and secure for their subscribers, the best and most diverse content available;
- (c) The penetration requirements, preferential dispensations from “delete” rights provisions (delete rights permit an MSO to terminate all distribution of an

- independent network at any time for any reason – It is our view that ALL networks should be subject to delete rights, not just independent networks), and other contractual terms imposed by powerful programmers; and
- (d) Other factors may also contribute to such practices.

But whatever the reasons are, the continuing failure of the large cable operators to grant access to new independent programmers is impossible to explain on the basis of market considerations alone, particularly in a world where digital capabilities are exponentially increasing cable operators' shelf space. The Commission has ample jurisdiction to help solve this problem, and The America Channel respectfully requests that it exercise such authority. The America Channel's viability, and that of many other current and prospective independent programmers, depend on the creation of a more level playing field.

V. Proposed Solutions and Recommendations

1. Free Tier of Widely-Distributed Networks

The Commission should consider encouraging the establishment of a tier of networks that do not charge any fees to distributors, in exchange for securing distribution to a substantial majority of all subscribers. Good products with sound economic models will succeed from advertising dollars alone when they are fully distributed. Within the Free Tier, a process of natural selection occurs where only networks that get ratings commensurate with their cost structure survive – a simple and efficient model. Under this “Free Distribution” model, it is not inconceivable that the consumer would ultimately be availed a suite of 30 or more high-quality ad-supported networks, for no fee other than a nominal charge by the cable company. Indeed, one day, consumers might decide that the Free Tier is all they need -- and that they don't want individual channels or expensive packages, for which they have to pay.

A network that is in 75+ million homes and still requires operator license fees to subsidize its business (which cost is then passed on to the consumer), does not have an efficient business model. If free networks are provided carriage and the ability to compete for audience, expensive competitor networks seeking payment would be forced to lower their rates. The competitive forces would result in more efficient networks that rely on advertising dollars alone, pressure on existing networks to streamline their businesses and become more efficient, and lower fees charged by legacy networks – thus lowering cost to the consumer. Over time, the Free Distribution model would result in a cottage industry where newer and cheaper high-quality networks replace expensive, unpopular legacy nets, passing the cost savings to the consumer. The Free Distribution model could result in a dramatically lower cable bill for the consumer – and have significant positive impact on the industry.

2. Prohibition on Bundling

To enable high-quality independent networks to compete in any scenario, including Free Distribution, an independent network first has to secure master carriage agreements with the major cable operators. The practice by content conglomerates, of bundling of networks with marginal value, results in reduction of available capacity. This diminished capacity prevents high-quality independent networks from securing carriage agreements. We therefore request an inquiry into the practice of bundling, so that all networks are required to compete fairly for the capacity based on their individual merits.

MSOs should be asked to submit details on any evidence of bundling, including any pricing of multiple nets from content conglomerates, and the decisional process that led to carriage of each net. If the MSOs cite bandwidth constraints and pricing pressures as reasons to reject an independent, then MSOs should detail the causes of lack of bandwidth and pricing pressures.

The term “linear network” is a derogatory term coined in the cable community. We question whether the definition of “non-linear network,” has been broadened to include “linear” networks with siblings -- carpooled by a conglomerate parent -- through the driveway and into the front door of the MSO -- with a bulldozer.

We at The America Channel will gladly compare our diligence with anyone’s. Our market research, both qualitative and quantitative, were stellar, and any network (much less any new network) would be challenged to achieve our results. Our planning and development commenced long before we ever approached the MSOs, knowing that as an independent we had to be bullet-proof beyond the MSO’s own nets. We’ll also gladly compare the reactions we’ve received at systems across the country, with the reactions to conglomerate-owned and MSO-owned nets.

3. Methodology for Empowering the Consumer to Select New Networks

For several years, cable MSOs have touted their groundbreaking progress in interactive features and technological advancements. Indeed, in spite of all of this, the most arcane and archaic methodology still employed by cable MSOs, seems to be the process of selection of new networks. It would seem easy to implement a process, by which the cable operator’s consumers would have access to online or interactive television polls and questionnaires, asking consumers which new channels they would like to receive, with descriptions of each channel. Independent channels would compete side by side against MSO-owned networks and conglomerate-owned networks. This process would be fair, accurate, and most importantly, empower the consumer. Thus far however, the MSOs have not provided the consumer with this ability. The Commission should encourage such a methodology.

4. Comparison - Carriage of Networks; Addition of Nets to New Systems; Analog

As stated above, the Commission should inquire as to how many truly independent nets have secured carriage in the past 12 months, and how many nets of conglomerates or MSOs have secured carriage.

As part of the above question, the Commission should not only inquire as to new master deals with conglomerate-owned or MSO-owned networks; but rather what new carriage was provided to conglomerate-owned or MSO-owned networks on a system by system basis. For example, if an MSO has an existing master agreement with a content conglomerate for XYZ Network – and XYZ Network is subsequently launched in 2 new cities (occupying capacity which otherwise could be used for an independent network), the MSO should properly report this as new carriage deals even though the master licenses are already in place, since this is in fact new carriage within a designated territory or territories.

MSOs should also report whether any conglomerate-owned or MSO-owned networks were upgraded from digital to analog on any cable systems. The America Channel is aware of at least one case of a relatively obscure bundled network from a conglomerate with multiple networks, which was recently moved from digital to analog on a large cable system in order to satisfy long-term contractual obligations under a comprehensive agreement between the MSO and the

conglomerate -- effectively preventing 6 digital channels from launching. Such an activity may not be in the best interest of the consumer.

5. Methodology of Determining Whether to Provide Carriage

The Commission should inquire whether there is a process or methodology by which an MSO determines whether to give carriage to a network, and if so, what is that process or methodology.

The Commission should inquire whether the methodology differs for MSO-owned nets, conglomerate-owned nets, and independent nets.

If the MSOs question the necessity of launching new digital channels, then the Commission should inquire as to the decision-making process that concluded a necessity with respect to recent or anticipated launches of conglomerate-owned nets (of which there have been a number); and why these nets provide more necessity than all independent nets.

6. Interaction Between Investment and Programming Divisions

The editor of *Cableworld*, an influential industry magazine, recently wrote with respect to an MSO: "It's telling that diginet execs' first meeting... isn't with [programming], who decides whether or not to carry a network... [T]he first meeting typically is with [investments], who decides if the diginet concept would be worthy of the MSO's investment." The Commission should confirm whether this is in fact correct, in light of its existing program carriage rules. The Commission should ask for further information as to the relationship and interplay between the programming investment arms and programming carriage arms of cable MSOs – and whether investments decisions, or decisions not to invest, adversely affect a network's ability to secure carriage.

VI. Conclusion

Accordingly, The America Channel urges the Commission to take, as first steps, the measures identified above.

Thank you and best regards.

Sincerely,

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